Supreme Court, U.S.
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No. 03-431

IN THE

Supreme Court of the United States

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF

In this case, the D.C. Circuit upheld[1] decisions of the Federal Energy Regulatory Commission ("FERC") that cannot be reconciled with FERC's statutory responsibilities under Section 1(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b), to regulate the terms and conditions of service imposed by pipeline monopolies on the offshore Outer Continental Shelf ("OCS"). The D.C. Circuit approved FERC's determination that the extensive pipeline systems at issue could be reclassified as non-jurisdictional gathering and abandoned without the findings required by Section 7(b) of the NGA that the public convenience or necessity permits the abandonment. 15 U.S.C. § 717f(b). The D.C. Circuit's holding is unlawful under the limited scope of the Section 1(b) gathering exemption established by *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 89-90 (1963) ("*Northern Natural*"). It also is at odds with decisions of this Court providing that once facilities are certificated they are dedicated to interstate service and may be abandoned pursuant to Section 7(b) only upon a finding that the "public convenience or necessity permit such abandonment." *See Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 141-42, 156 (1960) ("*Sunray*"). The D.C. Circuit's abandonment holding also directly conflicts with the Fifth Circuit's holding in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190, 1197 (5th Cir. 1997) ("*Pacific Gas & Electric*").

As explained in the Petition,[2] in contrast to *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*ExxonMobil*"), *cert. denied*, 124 S. Ct. 47 (2003), this case squarely involves the propriety of a pipeline's abandonment

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[1] *Williams Gas Processing—Gulf Coast Co. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) ("*Williams*").

[2] Petition for Writ of Certiorari, *Shell Offshore, Inc. v. FERC*, (No. 03-431), filed Sep. 15, 2003 ("Pet.") at 30.

of certificated gathering facilities and services and the resultant termination of FERC's rate jurisdiction. For that reason, this case is an appropriate vehicle to determine whether the explicit requirements of Section 7(b) must be met when a pipeline seeks to abandon reclassified gathering facilities and services that had been previously certificated and dedicated to interstate service.

1. FERC's Most Recent Indication That It *May* Reconsider Its OCS Gathering Policy Does Not Warrant Denial of the Petitions.

a. The FERC Conference Only Reinforces The Need For Court Review.

Respondents argue[3] that this Court should deny review because, subsequent to the decision below, FERC convened a public conference "to explore whether the Commission should reformulate its test for defining non-jurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." Notice of Public Conference, *Application of the Primary Function Test for Gathering on The Outer Continental Shelf*, FERC Docket No. AD03-13-000, issued Aug. 14, 2003 ("Notice"), Williams Opp'n App. at 1a. Contrary to Respondents' contention that the Court should deny the Petition to allow FERC to reconsider these matters, the FERC conference only reinforces the need for this Court's review.

After acknowledging that this is FERC's *fourth* review of its gathering policy, the Notice all but admits that FERC's current policy is unworkable and undermines needed cer-

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[3] Brief of Respondents Williams Gas Processing-Gulf Coast Company, L.P., and Transcontinental Gas Pipe Line Corporation in Opposition, *Producer Coalition v. FERC* (Nos. 03-147 and 03-431), filed Dec. 1, 2003 ("Williams Opp'n"); Brief for the Federal Energy Regulatory Commission in Opposition, *Producer Coalition v. FERC* (Nos. 03-147 and 03-431), filed Dec. 1, 2003 ("FERC Opp'n").

tainty and reliability in the regulatory scheme. *See, e.g.*, Williams Opp'n App. at 1a. ("a satisfactory definition of gathering under the Natural Gas Act has remained elusive."); Williams Opp'n App. at 9a. (result of current test "seems unfair to customers who may have made investments relying on the regulated status of the transporter, only to find themselves subject to the market power of that transporter in its new deregulated form.").

Further, FERC's Notice reflects the agency's continuing misapprehension that the scope of its jurisdiction under NGA Section 1(b) and its obligations to protect the public interest under NGA Section 7(b) are simply "policy issues" to be resolved in FERC's boundless discretion "in the first instance." FERC Opp'n at 11. To the contrary, FERC is constrained by this Court's interpretation of Sections 1(b) and 7(b). FERC must follow this Court's "longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." *California v. FERC*, 495 U.S. 490, 499 (1990). The failure of FERC and the D.C. Circuit to do so here has disrupted "a highly complex and long-enduring regulatory regime, implicating considerable reliance interests . . . ." *Id.* at 500. What is needed at this juncture is not another iteration of FERC's vacillating "policy" choices, but this Court's reaffirmation and application of its precedents to restore the Commission's jurisdiction over the critical pipeline infrastructure and services in the OCS here at issue.

b. The Government's Procedural Gambit Disserves The Industry As Well As FERC Itself.

The government seeks to avoid review in this case based on the mere possibility that FERC will reconsider its positions. However, there is no assurance that FERC will change its position following this conference, nor that any change will comply with *Northern Natural* or other precedents of this Court narrowly construing the NGA gathering

exemption.[4] Moreover, there is no assurance that FERC could effectively undo the abandonment of the facilities and services here at issue even in the event FERC changes its policies as a result of its latest policy review.

Review by this Court at this juncture is crucial given the split between the decision of the D.C. Circuit below and the decision of the Fifth Circuit in *Pacific Gas & Electric*. Regardless of whether FERC changes to the Fifth Circuit's side of the argument, a possibility raised by the Notice (Williams Opp'n App. at 10a), the conflict between the courts of appeal will continue. Until these matters are addressed by this Court, FERC will remain buffeted by the contending legal theories of two courts of appeal as parties aggrieved by a FERC decision on whether to apply the public convenience or necessity standard of Section 7(b) will seek relief from the court of appeals that embraces their side of the issue.[5]

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[4] The government's professed commitment to a genuine reconsideration of its positions is belied by its unequivocal position on the merits before this Court. For example, while the Notice suggests that FERC is considering whether it "may" apply the public convenience or necessity requirements of NGA Section 7(b) before allowing certificated facilities now classified as gathering to be transferred to a non-jurisdictional entity, Williams Opp'n App. at 10a, it takes the opposite view before this Court. In its Brief In Opposition, FERC unequivocally argues that the D.C. Circuit below properly found that FERC has no authority to consider the public interest before granting abandonment of facilities under these circumstances. *See* FERC Opp'n at 14.

[5] The conflict between the two courts of appeal also extends to the courts' views on the discretion held by FERC to distinguish between gathering and transmission under NGA Section 1(b). The D.C. Circuit has concluded in *ExxonMobil* and *Williams* that FERC's discretion is broad, and has revealed no inclination to second-guess FERC's judgment. The Fifth Circuit is not so deferential, revealing in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997) and *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989) a clear willingness to substitute its judgment for that of FERC.

2. Respondents Have Misstated Petitioners' Jurisdictional Contentions Concerning *Northern Natural* and Other Supreme Court Precedent.

Respondents incorrectly characterize the Shell Offshore Petitioners' argument as the "novel view . . . that any movement of gas in a pipeline operating in the OCS beyond the platform constitutes transportation." FERC Opp'n at 13. Far from asserting such a bright-line test, Shell Offshore Petitioners assert that FERC's reclassification of hundreds of miles of previously certificated transportation pipeline systems as non-jurisdictional gathering facilities is unlawful under this Court's controlling construction of the gathering exemption in Section 1(b) of the NGA. The FERC orders upheld by the D.C. Circuit expand the gathering exemption well beyond the "narrowly confined" facilities needed to draw gas from the earth and prepare it for the "first stages" of distribution envisioned in *Northern Natural*. *See Exxon Mobil*, 297 F.3d at 1093 (Edwards, dissenting) (stating that FERC's determination is "unlawful in light of what we have been told by the Supreme Court in *Northern Natural*"). Properly applying *Northern Natural* may of course confine gathering to facilities "closer to the production platforms," Pet. at 22, but the Shell Offshore Petitioners do not here assert that the offshore production platforms themselves are necessarily synonymous with the demarcation point between gathering and transmission contemplated by *Northern Natural*. Notwithstanding Respondents' suggestions, confirming the failure of the FERC and the D.C. Circuit to properly apply the narrow definitions of gathering set forth in *Northern Natural* does *not* require the Court to undertake a highly technical and fact-bound effort to draw precise lines of demarcation between non-jurisdictional gathering and jurisdictional transportation.

In other transparent efforts to set up "straw-men" positions, Respondents wrongly characterize the Shell Offshore Peti-

tioners' arguments as stating: (1) that a facility may be classified as gathering "only if a State could regulate the activity under the Commerce Clause," such that there can be no gathering facilities on the OCS where State authority does not exist (FERC Opp'n at 13 n.6); and (2) that the Congressional intent in enacting the NGA was to extend federal jurisdiction to the full extent of its authority under the Commerce Clause. FERC Opp'n at 13, n.6; Williams Opp'n at 12. The Shell Offshore Petitioners make neither contention. Rather, their precise position is directly drawn from this Court's precedents: Under the NGA, Congress created a comprehensive regulatory scheme of dual federal and state authority with federal regulation intended to "occupy the field in which the Supreme Court has held that the States may not act." Pet. at 15, *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 185 (1983). The Shell Offshore Petitioners do not contend that Congress preempted previously authorized state regulation by extending the jurisdictional reach of the NGA to the full extent of the Commerce Clause. Indeed, Section 1(b) of the NGA expressly preserves state authority over such activities. Further, the fact that states have no authority on the OCS does not expand FERC's authority to gathering facilities and services in the OCS as properly defined under *Northern Natural* and does not mean that there can be no gathering facilities on the OCS. The jurisdictional gap resulting from the absence of both FERC and state authority over gathering facilities on the OCS underscores the need for FERC and the courts to limit the scope of the Section 1(b) gathering exemption in accordance with the precedents of this Court, but the Shell Offshore Petitioners do not argue that the gap itself serves to expand FERC jurisdiction beyond the scope established under the Court's precedent.

Respondent Williams further argues that the Court need not be concerned by producers' reliance on the NGA regulatory regime for protection against pipeline monopoly power because the Outer Continental Shelf Lands Act, 43 U.S.C.

§ 1331, *et seq.*, ("OCSLA") protects all shippers on OCS pipelines from the exercise of unconstrained market power. Williams Opp'n at 9-11. The limited protections provided under OCSLA provide no rationale for leaving undisturbed the failure of FERC and the D.C. Circuit to properly apply this Court's longstanding precedents interpreting Sections 1(b) and 7(b) of the NGA. As the D.C Circuit itself found in *Williams Cos. v. FERC*, 345 F.3d 910, (D.C. Cir. 2003) ("*Williams Cos.*"), OCSLA "do[es] *not* grant FERC general powers to create and enforce open access rules on the OCS . . . ." *Id.* at 916 (emphasis added). In the D.C. Circuit view, Section 1334(f) of OCSLA "simply requires the Secretary of Interior to condition grants of rights-of-way on the holder's agreeing to non-discriminatory transportation duties." *Id.* at 913. Of central importance to the effective regulation of pipeline monopolies in the OCS, OCSLA contains no express prohibitions and enforcement authority comparable to that provided by the NGA that would allow FERC or any other agency to proscribe the exercise of market power by interstate pipelines through the imposition of monopolistic rates, terms and conditions of service. In any event, however OCSLA ultimately may be applied, FERC's obligations to enforce the NGA remains in place, and FERC has no authority to exempt any entity that is subject to FERC's NGA jurisdiction. *See FPC v. Texaco Inc.*, 417 U.S. 380, 394 (1974).

3. *Williams* And *Pacific Gas & Electric* Pose A Square Conflict In The Circuits Concerning The Critical Abandonment Protections Of Section 7(b) Of The NGA.

a. There Is A Conflict Between The Circuits.

Respondents seek to obscure the existence of a direct conflict between the D.C. Circuit's decision in *Williams* and the Fifth Circuit's decision in *Pacific Gas & Electric*. Respondent Williams quibbles with the D.C. Circuit's own characterization of its decision as in conflict with the Fifth

Circuit's holding in *Pacific Gas & Electric* and argues that the Fifth Circuit did not really decide whether "FERC has discretion to examine whether abandonment [of previously certificated gathering facilities] would be in the public interest." Williams Opp'n at 19 (*quoting Williams*, 331 F.3d at 1022.) But the Fifth Circuit in *Pacific Gas & Electric* did address this issue and clearly determined that under Section 7(b) of the NGA FERC may not *allow* an abandonment of previously certificated facilities currently classified as gathering without ensuring that the "future public convenience or necessity permits such abandonment." *Pacific Gas & Electric*, 106 F.3d at 1197. The D.C. Circuit in *Williams* reached precisely the opposite conclusion, *i.e.* that FERC may not *deny* an abandonment of previously certificated facilities currently classified as gathering because FERC has no authority to even consider whether the public convenience or necessity permits such abandonment. *Williams*, 331 F.3d at 1022.

FERC also claims there is no conflict. FERC in effect argues that *Pacific Gas & Electric* did not involve the abandonment of certificated transportation pipelines *reclassified* from transmission to gathering, but instead concerned the abandonment of certificated facilities *already classified* as gathering facilities. FERC Opp'n at 17. This is a distinction without a difference. At issue in both *Williams* and *Pacific Gas & Electric* is whether the Section 7(b) abandonment requirements apply to gathering facilities certificated pursuant to Section 7(c) of the NGA.[6]

Respondents assert that the D.C. Circuit's interpretation of the abandonment requirements is consistent with the language

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[6] In *Pacific Gas & Electric*, El Paso sought abandonment authority for gathering system facilities that were subject to certificates of public and convenience and that El Paso sought to transfer to a non-jurisdictional affiliate. *See El Paso Natural Gas Co.*, 72 F.E.R.C. (CCH) ¶ 61,220 (1995).

of NGA Section 7(b) and the precedents of this Court. FERC Opp'n at 14 and Williams Opp'n at 18 (citing *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949)). But *Panhandle* simply held that the abandonment requirement did not apply to gas leases that were never certificated and were beyond the FERC's jurisdiction. *Id.* at 509. In contrast, the facilities here at issue were certificated and, therefore, dedicated to interstate service. *See California v. Southland Royalty Co.*, 436 U.S. 519, 525-26 (1978); *Sunray*, 364 U.S. at 156. FERC's NGA Section 7(c) certificate authority governs interstate market entry and its Section 7(b) abandonment authority covers market exit. *See Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 506 (1989). Upon certification, facilities are dedicated to interstate service and thereby "subject to the jurisdiction of the Commission" until the Commission authorizes abandonment under the public convenience or necessity standard of NGA Section 7(b). Thus, contrary to the D.C. Circuit's view, Pet. App. at 19a, reclassification of certificated facilities does not by itself authorize abandonment; instead, FERC may authorize abandonment of such reclassified facilities only upon a finding of the public convenience and necessity. Consistent with the holding in *Pacific Gas & Electric*, but inconsistent with *Williams*, this Court has ruled that NGA Section 7(b) "simply does not admit of *any* exception to the statutory procedure." *See United Gas Pipeline Co. v. McCombs*, 442 U.S. 529, 536 (1978) (emphasis added).

b. FERC's Conclusory Public Interest Findings Do Not Warrant Denial Of The Petition.

While FERC argues that the D.C. Circuit correctly concluded that FERC lacks discretion to deny abandonment of gathering facilities previously certificated as transmission, FERC claims there is no need for this Court's review of the decision because, in the alternative, FERC "found that 'the public convenience and necessity' permitted Transco's re-

quested abandonment and transfer to its affiliate." FERC Opp'n at 14. FERC's conclusory "findings" do not obviate the fundamental conflict between the courts of appeal or otherwise support denial of the Petition.

FERC's public interest "findings" are that abandonment will enhance competition and that shippers will remain protected under the Commission's regulations under OCSLA. FERC Opp'n at 14-16; Pet. App. at 74a-77a. These conclusions are unsupported by record evidence or reasoned analysis. Indeed, they are refuted by FERC's conclusions regarding the adverse impacts of reclassification and abandonment of gathering facilities on the OCS set forth in its 1996 Policy Statement[7] and more recently in its Notice. *See, e.g.*, Williams Opp'n App. at 9a. Further, the reliance of FERC (Pet. App. at 74a-77a) and of the D.C. Circuit (Pet. App. at 19a) on FERC's regulatory regime under OCSLA was plainly misplaced given the recent decision of the D.C. Circuit to vacate FERC's OCSLA regulations. *See Williams Cos.*, 345 F.3d at 916.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition should be granted.

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[7] *Gas Pipeline Facilities and Services on the Outer Continental Shelf-Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, 74 F.E.R.C. (CCH) ¶ 61,222 at 61,752 n.5, 61,756-7 (1996) ("1996 Policy Statement"); *see* Pet. at 27-29.

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